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To: Microsoft ATR
Date: 1/23/02 1:46pm
Subject: Microsoft Settlement

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Greetings,

I am writing in order to submit my comments on the Revised Proposed Final Judgement. While the settlement makes a good start, I feel it is inadequate overall and leaves possible loopholes open for exploitation. The past behavior of the guilty party indicates that it is likely to do everything in its power to minimize the effect of the proposed settlement. This behavior includes the guilty parties behavior with respect to the last "Consent Decree" which it agreed upon with the Government as well as its current refusal to admit guilt or even concede that it has misbehaved at all. In all respects, Microsoft behaves as an unrepentant career criminal. As such, it is not deserving of mercy from the court. I fear that the Proposed Judgement may allow the guilty party to escape relatively unscathed.

Section III, Prohibited Conduct, attempts to address the guilty parties relationship with OEM vendors. It is well known that this has been a well-used tool in the past to keep OEM hardware vendors in line. It can be expected that Microsoft will take advantage of any loophole it finds in Section III in order to continue this behavior. As such, Section III should be as simple as possible. I would suggest modifying paragraph B with two changes. First, the "schedule" of prices should be publicly available via the web. There is no reason to keep the prices confidential. The end consumers of Windows have every right to know the true value of that component of their computer. I also feel that clause 3. ("the schedule may include market development allowances...") should be stricken. Despite the attempt to close the obvious loophole, I doubt that it will prevent the guilty party from resuming past behavior. Microsoft is literally making more money than it knows what to do with. I can very well pay its own marketing and development costs. Allowing it to make these side agreements with OEMs only serves the purpose of giving it an avenue to reward favored OEMs at the expense of other OEMs. The relationship between Microsoft and OEMs should consist of the act of selling software period. Allowing any other relationship simply opens an avenue for abuse.

Paragraph D should also be modified. While it is a good idea to require Microsoft to publish the API's used by Microsoft Middleware, there is no reason to allow the guilty party to restrict access to the "MSDN". The simply gives the guilty party an avenue to require developers to agree to licenses or terms of use. For example, access to "MSDN" now requires a "Passport" account. It is entirely inappropriate to allow Microsoft to condition access to the API's upon accepting their attempt to extend their monopoly to online authentication. Microsoft should be required to publish the API's on the web without any need for either registration or authentication.

An oversight of the API provisions is that it does not apply to file formats. One of the goals of the Judgement should be to try and restore competition to the desktop operating system market. One of the anchors of

the Microsoft monopoly which was not specifically addresses in the most recent case is the Microsoft Office product. One of the greatest stumbling blocks for potential competetors on the desktop is the need of people to be able to read and write files in the various Office formats (Word, Excel, PowerPoint, etc.) By constantly changing these formats with each upgrade and not providing comprehensive documentation on their structure, Microsoft has been able to maintain a significant barrier to entry into the desktop operating system market. By including file formats along with API's and communication protocols the Court can greatly enhance the opportunity for competing products to become established in the operating system market.

Paragraph J should be stricken entirely. It has at least two fatal flaws. One is the axiom that security thru obscurity is no security at all. By allowing Microsoft to use security as an reason to refuse to release communication protocols and APIs it encourages them to design security solutions which do not provide strong security, but rather merely the illusion of security. Given the predominance of Microsoft operating systems and the past abysmal security performance of their products, it isn't wise to provide an incentive for them produce poor solutions going foreware. The second fatal flaw, which is perhaps more important, is that this clause provides a loophole which will allow Microsoft to avoid paragraphs D thru I. Recent pronouncements from the guilty party and Bill Gates indicate that security will be given the highest priority going forward. Most significant uses of network protocols involve some amount of authentication. Digital rights management and virus protection can be incorporated into virtually all aspects of operating system functionality. In fact, these technologies work best when they are prevalent thruout the system. These facts, along with the guilty parties abuse of loopholes in previous agreements, indicates that paragraph J will likely be used as a method of invalidating paragraphs D thru I. The court should either strike paragraph J, or strike paragraph D thru J. The current agreement will end up imposing little to no restraint on the convicted party.

Section IV, while it contains a good start, falls a little short. While the Judgement contains good provisions for determining if the convicted party is complying with the Judgement, there are no clear penalties for breaking the agreement. In fact, the extent of refusing to comply with the court ordered judgment seems to be the application of more court orders. To date, court orders have not had any significant impact on the convicted parties conduct. Rather, it has managed to accumulate profits at an almost unbelievable rate. Any significant penalty should involve significant monetary fines. While the need and amount of fines for previous criminal actions could be argued endlessly, the court should at a minimum include provisions for significant fines going forward should Microsoft refuse to yield to the authority of the court. Such fines should be commensurate with the revenues and profits of Microsoft. In the most recent quarter, the guilty party profited at the rate of about \$20,000,000 per day. Revenues were about four times that amount. In order for a fine to have any sting, I feel that at a minimum it should accrue at the rate of their profits. In

other words, the Judgement should contain language which would impose a fine of at least \$20,000,000 per day that the convicted party is not in compliance with the Judgement. To date, Microsoft has employed a strategy of legal delay at almost every turn. The reason is clear: while issues are dragged out in court the damage is being done in the market. By the time the court is able to issue a remedy, Microsoft has already accomplished whatever it set out to do in the first place. By imposing significant fines, the court can discourage such delays in the future in addition to ensuring actual penalties for violation of the Judgement.

In conclusion, I hope the court takes some of these ideas into consideration before rendering a final judgement. To be honest, I am amazed at the lengths to which the Court has gone to please the convicted. The fact is that Microsoft is not simply guilty, but is a repeat offender who has shown no signs or remorse nor even acknowledged that it has broken the law. Rather than issuing a swift and severe punishment as befits such a disrespectful repeat offender, the Court seems to be bending over backwards in order to please the convicted. Quite frankly, in this day and age, I see no reason to be soft on such a criminal organization whose disrespect for the Court includes the falsification of evidence and who shows no signs of even understanding the relevant law much less admitting that the law applies to them.

-David Mitchell

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